IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2007 Session

JANIE CABANY v. MAYFIELD REHABILITATION AND SPECIAL CARE CENTER ET AL.

Appeal from the Circuit Court for Rutherford County
No. 51066 J.S. Daniel, Judge

No. M2006-00594-COA-R3-CV - Filed November 15, 2007

This appeal involves the enforceability of an arbitration clause in a nursing home's admission contract. The resident was admitted to the nursing home following hospitalization for unsatisfactory care at another nursing home. Upon admission, the resident's spouse signed an admission contract containing an arbitration clause. After the resident's death, his spouse filed suit in the Circuit Court for Rutherford County against her husband's healthcare providers, including the nursing home. When the nursing home moved to compel arbitration in accordance with its admission contract, the resident's spouse asserted that the arbitration clause was unenforceable because (1) she did not have actual authority to waive her spouse's right to a jury trial, (2) the arbitration clause was a contract of adhesion, and (3) the arbitration clause violated a federal law prohibiting nursing homes from receiving additional consideration apart from Medicare or Medicaid in the admissions process. The trial court declined to compel arbitration after concluding that the resident's durable power of attorney for healthcare applied only to medical decisions and that the decision to waive the right to a jury trial was a legal, not a medical, decision. The nursing home has appealed. We have determined that the trial court's interpretation of the scope of the resident's power of attorney for healthcare was too narrow and that the trial court also erred by failing to determine first whether the conditions authorizing the spouse to act under the power of attorney for healthcare existed when she executed the admission contract.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J. and JERRY SCOTT, SR. J., joined.

John B. Curtis, Jr. and Bruce D. Gill, Chattanooga, Tennessee, for the appellant, NHC Healthcare, Murfreesboro a/k/a NHC, Inc.

Larry D. Wilks, Springfield, Tennessee, for the appellee, Janie Cabany.

OPINION

I.

On September 22, 2003, Thomas Cabany, Jr. executed a "Tennessee Healthcare Durable Power of Attorney," designating Janie E. Cabany, his wife, as his "healthcare agent or attorney-in-fact."[1] This power of attorney informed Mr. Cabany that

> Notwithstanding this document, you have the right to make medical and other healthcare decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and healthcare necessary to keep you alive may not be stopped or withheld if you object at the time.[2]

Consistent with this notice, Mr. Cabany specifically stated in the power of attorney for healthcare that it "only becomes effective when I can't make my own medical decisions." The power of attorney for healthcare also gave Mr. Cabany's healthcare agent and his attending physician the authority to determine whether he was unable to make his own healthcare decisions.

On September 30, 2003, Mr. Cabany was admitted to the Mayfield Rehabilitation and Special Care Center ("Mayfield") in Smyrna.[3] His assessment at the time of admission indicated that he was at a high risk for falling. In late November 2003, Mr. Cabany fell from his unsecured bed and was found lying on the floor. By early December 2003, Mr. Cabany began to exhibit severe mood and behavior changes. He was hospitalized at the Stones River Hospital on December 6, 2003, but was readmitted to Mayfield on December 23, 2003.

Mr. Cabany fell out of bed again on his first day back at Mayfield. He was not examined immediately, even though he complained of hip pain. Mayfield initially informed Mr. Cabany's family that he was merely being lazy and was trying to avoid physical therapy. When Mr. Cabany was examined on December 26, 2003, the wrong hip was X-rayed. By late December 2003, Mr. Cabany's condition had dramatically deteriorated compared to his condition on admittance to Mayfield just three months earlier. At that time, he required assistance for all the activities of his daily living.

Additional X-rays taken on January 2, 2004 revealed that Mr. Cabany had broken his hip. Before he was transported to the Middle Tennessee Medical Center ("MTMC") for treatment, the

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[1]The power of attorney for healthcare that Mr. Cabany signed was a pre-printed form. The record contains no evidence regarding the source of the document.

[2]This notice is required by Tenn. Code Ann. § 34-6-205 (2007).

[3]The facts regarding Mr. Cabany's care and treatment contained in this opinion have been taken from his complaint. This court's discussion of Mr. Cabany's care and treatment should not be misunderstood as a finding with regard to any of the facts relevant to his or his wife's claims against any of the healthcare providers named as defendants in this case.

nurses at Mayfield noted a 1.5 centimeter round red dark area on Mr. Cabany's coccyx.[4] On January 7, 2004, the MTMC staff noted that Mr. Cabany had a pressure ulcer but did not treat it. Three days later, on January 10, 2004, when MTMC discharged Mr. Cabany to NHC HealthCare, Murfreesboro ("NHC"), the hospital staff noted only a quarter-sized wound and a fever. However, when Mr. Cabany was readmitted to the hospital later the same day, the staff noted seven wounds.

On the day before Mr. Cabany was discharged from MTMC, Ms. Cabany executed an "Admission and Financial Contract" provided by NHC as Mr. Cabany's "legal representative." The record contains no evidence regarding the circumstances surrounding the execution of this document other than the recitations in the admission contract itself. The contract includes a two-page "Jury Trial Waiver and Dispute Resolution Procedure" that was separately signed by Ms. Cabany. By executing this provision, Ms. Cabany, on behalf of Mr. Cabany, agreed to waive his right to a jury trial to resolve claims and disputes if the amount of the dispute exceeded the statutory limits of the local general sessions court. She also agreed to submit these disputes to binding arbitration.[5] The contract bears Ms. Cabany's signature but not Mr. Cabany's. A handwritten notation next to Ms. Cabany's signature states "Pt. [Mr. Cabany] is not physically able to sign due to Parkinson's disease."

Mr. Cabany was readmitted to MTMC on January 19, 2004 for care related to a foul smelling bedsore on his sacrum.[6] By January 22, 2004, the ulcers on Mr. Cabany's coccyx and sacrum had combined to form one large wound. The records also indicate the existence of "a maximum amount of purulent drainage with a foul odor." On January 27, 2004, NHC advised that Mr. Cabany was terminal, and a do-not-resuscitate order was placed in his chart. Mr. Cabany died on February 4, 2004 at NHC. His death certificate listed as his causes of death as sepsis, skin and urinary tract infection, and immobility from dementia and a hip fracture.

On November 29, 2004, Ms. Cabany filed a wrongful death action in the Circuit Court for Rutherford County, naming Mayfield, MTMC, NHC, and others. Notwithstanding the jury trial waiver she had signed on January 9, 2004, Ms. Cabany requested a jury trial. On February 22, 2005, NHC filed an answer and a motion to compel arbitration. Following a hearing on February 1, 2006, the trial court denied NHC's motion. The trial court reasoned that Mr. Cabany's durable power of attorney for healthcare only conferred on Ms. Cabany the authority to make "health care decisions" as defined in Tenn. Code Ann. § 34-6-201(3) (2007) and that the decision to submit Mr. Cabany's disputes to binding arbitration was not a "health care decision." Therefore, the trial court concluded

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[4]The "coccyx" is the "small bone at the end of the vertebral column in man, formed by the fusion of four rudimentary vertebrae; it articulates above with the sacrum." *PDR Medical Dictionary* 359 (1st ed. 1995).

[5]The "Jury Trial Waiver and Dispute Resolution Procedure" also stated that both parties had the right to revoke the agreement to accept binding arbitration within ten days. The record contains no indication that the Cabanys ever attempted to revoke Ms. Cabany's waiver of Mr. Cabany's right to a jury trial.

[6]The "sacrum" is the "segment of the vertebral column forming part of the pelvis; a broad, slightly curved, spade-shaped bone, thick above, thinner below, closing in the pelvis girdle posteriorly; it is formed by the fusion of five originally separate sacral vertebrae; it articulates with the last lumbar vertebra, the coccyx, and the hip bone on either side." *PDR Medical Dictionary* 1566.

that Ms. Cabany did not have the authority to waive Mr. Cabany's right to a jury trial. NHC appealed from the trial court's denial of its motion to compel arbitration.

II.

This court reviews a denial of a motion to compel arbitration, whether under the Federal Arbitration Act or the Tennessee Uniform Arbitration Act, using the same standards that apply to bench trials. *Hubert v. Turnberry Homes, LLC*, No. M2005-00955-COA-R3-CV, 2006 WL 2843449, at *2 (Tenn. Ct. App. Oct. 4, 2006) (No Tenn. R. App. P. 11 application filed); *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 706-07 (Tenn. Ct. App. 2006). The standards this court uses to review the results of bench trials are well settled. With regard to a trial court's findings of fact, we review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn.1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004).

Reviewing findings of fact under Tenn. R. App. P. 13(d) requires an appellate court to weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. *Realty Shop, Inc. v. RR Westminster Holding, Inc*., 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). There is a "reasonable probability" that a proposition is true when there is more evidence in its favor than there is against it. *Chapman v. McAdams*, 69 Tenn. (1 Lea) 500, 506 (1878); *see also* 2 McCormick on Evidence § 339, at 484 (Kenneth S. Broun ed., 6th ed. 2006) (defining "proof by a preponderance" as "proof which leads the [finder of fact] to find that the existence of the contested fact is more probable than its nonexistence"). The prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Parks Props. v. Maury County*, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001).

Tenn. R. App. P. 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005). Because of the presumption, an appellate court is bound to leave a trial court's finding of fact undisturbed unless it determines that the aggregate weight of the evidence demonstrates that a finding of fact other than the one found by the trial court is more probably true. *Parks Props. v. Maury County*, 70 S.W.3d at 742. For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d at 596.

The presumption of correctness afforded by Tenn. R.App. P. 13(d) applies only to findings of fact, not to conclusions of law. *Cumberland Bank v. G & S Implement Co., Inc.*, 211 S.W. 3d 223, 228 (Tenn. Ct. App. 2006). Accordingly, we review a trial court's resolution of legal issues without employing a presumption of correctness and reach our own independent conclusions regarding these matters. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980

S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000).

III.

The pivotal question on this appeal is whether the power of attorney for healthcare that Mr. Cabany executed on September 22, 2003 gave Ms. Cabany the authority to execute NHC's "Admission and Financial Contract" that contained an agreement to waive Mr. Cabany's right to a jury trial and to submit disputes with NHC to binding arbitration. The trial court reasoned that it did not because deciding whether to waive the right to a jury trial was a legal, not a medical, decision. The Supreme Court has now rejected this reasoning. *Owens v. Nat'l Health Corp.*, ___ S.W.3d ___, ___, 2007 WL 3284669, at *6-7 (Tenn. Nov. 8, 2007).

Mr. Cabany had been informed in the preamble to his power of attorney for healthcare that unless he included specific limitations in the document, his wife would have the authority "to consent, to refuse to consent, or to withdraw consent to any care, treatment, service or procedure to maintain, diagnose, or treat a physical or mental condition." After receiving this advice, Mr. Cabany executed the power of attorney for healthcare giving his wife the power "to make all healthcare decisions for me." This grant of authority is as broad as the relevant Tennessee statutes permit. Pursuant to Tenn. Code Ann. § 34-6-204(b) (2007), it gave Ms. Cabany the power to make healthcare decisions for Mr. Cabany "to the same extent" that he could. This authority extended to the authority to agree to binding arbitration as part of the contract of admission to a nursing home.

IV.

In their rush to address the interesting legal question regarding the efficacy of a binding arbitration provision in a contract for admission to a nursing home, the parties and the trial court overlooked a basic foundational issue. They did not ascertain whether, at the time Ms. Cabany executed NHC's contract of admission, she was validly exercising the authority vested in her by Mr. Cabany's September 22, 2003 power of attorney for healthcare.

The execution of a power of attorney creates a principal-agent relationship. *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296-97 & n.1 (Tenn. Ct. App. 2001). A power of attorney is a written instrument that evidences to third parties the purpose of the agency and the extent of the agent's powers. *Tenn. Farmers Life Reassurance Co. v. Rose*, ___ S.W.3d ___, ___, 2007 WL 2826918, at *4 (Tenn. 2007). Thus, the language of a power of attorney determines the extent of the power that the power of attorney conveys, and the language should be construed using the same rules of construction generally applicable to contracts and other written instruments. *Tenn. Farmers Life Reassurance Co. v. Rose*, 2007 WL 2826918, at *4.

Mr. Cabany's power of attorney for healthcare clearly empowered Ms. Cabany to act for him only "when I can't make my own medical decisions." By plain language of the power of attorney for healthcare, Ms. Cabany was not authorized to sign NHC's contract of admission on January 9, 2004 unless Mr. Cabany was unable to do so. This record contains absolutely no evidence regarding Mr. Cabany's ability to make medical decisions on January 9, 2004 when Ms. Cabany signed NHC's

admissions contract or any evidence regarding any steps that NHC may have taken to ascertain whether Mr. Cabany was competent to make his own decisions.

Personal autonomy – an adult's right to live independently and in accordance with his or her own personal values – is a fundamental right. *In re Conservatorship of Groves*, 109 S.W.3d 317, 327-28 (Tenn. Ct. App. 2003). The right is of sufficient importance that the law presumes that adults have the capacity to be autonomous. *In re Conservatorship of Groves*, 109 S.W.3d at 329-30. Tennessee's General Assembly has explicitly stated that "[a]n individual is presumed to have capacity to make a health care decision, to give or revoke an advance directive, and to designate or disqualify a surrogate." Tenn. Code Ann. § 68-11-1812(b) (2006). The force of this presumption does not wane as a person ages, *In re Conservatorship of Groves*, 109 S.W.3d at 330, and the burden is on the party seeking to rely on an individual's incapacity.[7]

Persons today have a common sense understanding that their capacity to be autonomous and their capacity to make decisions on their own may become impaired. The General Assembly has responded by providing a variety of tools that empower and enable individuals to exercise control over their lives and property by making decisions in advance. Examples of these tools include durable powers of attorney,[8] living wills,[9] advanced directives,[10] and durable powers of attorney for healthcare.[11] These tools allow individuals to make specific treatment decisions and to designate a trusted individual as their surrogate decision-maker in the event they become incapacitated.

Mr. Cabany availed himself of the option of creating a durable power of attorney for healthcare to empower Ms. Cabany to make decisions on his behalf in the event that he became incapacitated. The document, however, expressly provides that it does not become effective until Mr. Cabany is no longer capable of making decisions for himself. Mr. Cabany retained in his healthcare power attorney "the right to make medical and other healthcare decisions for [himself] so long as [he] [could] give informed consent with respect to the particular decision." The determination of whether Mr. Cabany retained the capacity to make decisions for himself was to be made by his "agent and [his] attending physician." In other words, unless Mr. Cabany was incapable of making healthcare decisions for himself, he remained the sole authorized decision-maker.

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[7] *Grun v. Countrywide Home Loans, Inc.*, No. Civ.A.SA-03-CA-0141-XR, 2004 WL 1509088, at *4 (W.D. Tex. July 1, 2004); *Wheeless v. Gelzer*, 780 F. Supp. 1373, 1382 (N.D. Ga. 1991); *Guest v. Beeson*, 2 Houst. 246, 265, 1860 WL 1194, at *12 (Del. Super. Ct. 1860); *Gulf Life Ins. Co. v. Wilson*, 181 S.E.2d 914, 916 (Ga. Ct. App. 1971); *In re Estate of Taggart*, 619 P.2d 562, 565 (N.M. Ct. App. 1980); *In re Estate of Obermeier*, 540 N.Y.S.2d 613, 613-14 (App. Div. 1989); *Cloud v. U. S. Nat'l Bank of Or.*, 570 P.2d 350, 355 (Or. 1977).

[8] Tenn. Code Ann. §§ 34-6-101 though -111 (2007).

[9] Tenn. Code Ann. §§ 32-11-101 through -113 (2007).

[10] Tenn. Code Ann. §§ 68-11-1801 through -1815 (2006).

[11] Tenn. Code Ann. §§ 34-6-201 through -218 (2007).

Upon this record, NHC cannot meet its burden of demonstrating that Mr. Cabany lacked capacity to execute its admission contract and agree to binding arbitration in January 2004. Responding to an inquiry during oral argument, counsel for NHC stated that there is no evidence in the record indicating Mr. Cabany was unable on January 9, 2004 to decide for himself whether to waive his right to a jury trial in the event of a dispute. Questioned as to whether there had been any prior determination that Mr. Cabany was incapable of making decisions on his own behalf, NHC's counsel answered, "No, your honor, not that I am aware of."[12] Simply stated, there is no evidence in the record as to what Mr. Cabany's mental capacity was when Mr. Cabany executed NHC's admission contract. [13]

Furthermore, the admission and financial contract signed by Ms. Cabany when her husband was admitted to the NHC nursing home suggests that Mr. Cabany was not mentally incapacitated.[14] The form includes boxes that are to be marked to indicate the type of authority being exercised by anyone signing on behalf of the patient and setting forth the scope of the authority that the signer is exercising. Specifically, the form states, "[p]lease check the **type** and **scope** of authority for anyone other than the Patient who signs this contract . . .."[15] There are five "type" boxes: (1) guardianship, (2) limited, durable POA, (3) unlimited/durable POA, (4) power of attorney, and (5) other (specify). There is no indication from the contract that Ms. Cabany signed in the capacity of an attorney-in-fact. Quite to the contrary, although there are multiple boxes that could be marked reflecting a power of attorney status, they are all blank. On Mr. Cabany's admission and financial contract form, the box for "other" is marked and the word "spouse" is handwritten in the blank space provided. In addition, there are also four "scope" boxes that were also left unmarked: (1) routine health care, (2) unlimited health care, (3) limited access to income/financial, and (4) authorized to accept income and to control financial resources of Patient. Accordingly, based upon a review of the contract upon which NHC relies, it appears that Ms. Cabany and the NHC representative believed Ms. Cabany to be signing as Mr. Cabany's spouse not his attorney-in-fact.[16]

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[12] In response to the question "Had there been any finding on or before January 9, 2004 that Mr. Cabany was unable to make a decision of that sort?" NHC's counsel replied, "No, your honor, not that I am aware of."

[13] In response to the question "What evidence, if any, is there in the record that on January 9, 2004 Mr. Cabany was unable mentally to decide whether he would agree to waive his right to a jury trial in the event of a dispute?" NHC's counsel answered, "There is no evidence in the record with respect to what his mental capacity was or anything at the time the documents were executed."

[14] We are not in this opinion finding that Mr. Cabany retained capacity to make healthcare decisions or any other sort of decision in January 2004. Rather, we are only concluding that upon the record before us a contrary finding is not permissible based upon the presumption of capacity and the absence of evidence to the contrary.

[15] Emphasis in the original.

[16] NHC has not argued on appeal that Ms. Cabany has an inherent authority as the next of kin to waive her husband's right to a jury trial by agreeing to arbitration as part of making healthcare decisions on his behalf. Even if this argument had been presented and we were to assume *arguendo* that an individual's next of kin has such authority, the same foundational problem would exist insofar as there is no evidence upon which to conclude that Mr. Cabany was incapacitated on January 9, 2004.

A notation on the contract and the failure to record a determination as to Mr. Cabany's mental capacity also undermine the conclusion that Mr. Cabany was incapacitated. A written notation on the contract states that "Pt. is not physically able to sign due to Parkinson's disease." This notation suggests that Mr. Cabany may have been mentally capable but instead was unable to sign due to a physical disability. Nevertheless, there is no indication from the record or NHC's argument that Mr. Cabany was actually present, apprised of the terms of the contract, and merely had his wife sign because of his physical inability to do so. Nor has NHC argued that the contract signing occurred in such a manner. Finally, there is no indication on the form or otherwise that NHC made any efforts to determine and then record whether Mr. Cabany had capacity to make this decision for himself.

Although autonomy is often characterized in terms of independence and self-sufficiency[17] and although the elderly may suffer limits on both, they do not necessarily lose their capacity for autonomous decision-making, including making healthcare decisions. Nor should planning for future contingencies by signing a power of attorney for health care that provides, by its own terms, that it will become effective only upon incapacity render the autonomy of older Tennesseans easier to discard as too cumbersome to navigate. Execution of such a document is not tantamount to an immediate surrender of decision-making authority. Just because the body becomes more frail, older Tennesseans do not lose an autonomy that respects "their desire to make choices and direct their lives according to their value system and life experiences" and the ability to initiate action in a manner "consistent with the person's sense of self."[18] There is no evidence in the record before us that would allow this court to conclude that NHC has met its burden of showing that Mr. Cabany was incapacitated in January 2004 and that his right to autonomous decision-making had been transferred under his durable healthcare power of attorney to Ms. Cabany.

IV.

We vacate the May 17, 2006 order denying NHC's motion to compel arbitration first because the trial court had not addressed the threshold question regarding Mr. Cabany's decision-making capacity in January 2004, and second because the trial court erred by concluding that the power of attorney for healthcare that Mr. Cabany executed on September 22, 2003 did not authorize Ms. Cabany to waive her husband's right to a jury trial and agree to binding arbitration.[19] We remand

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[17] *See e.g.*, Martha Albertson Fineman, *The Social Foundations of Law*, 54 Emory L.J. 201, 224 (2005); Charles W. Lidz & Robert M. Arnold, *Rethinking Autonomy in Long Term Care*, 47 U. Miami L. Rev. 603, 608 (1993).

[18] Sarah Moses, *A Just Society for the Elderly: The Importance of Justice as Participation*, 21 Notre Dame J.L. Ethics & Pub. Pol'y 335, 340-41 (2007).

[19] As far as this record shows, the parties have not yet addressed Ms. Cabany's argument that the provision for binding arbitration in NHC's contract of admission should not be enforced because it is a contract of adhesion. The Tennessee Supreme Court has held that a "pre-dispute arbitration agreement in a nursing-home contract is not per se invalid as against public policy." *Owens v. Nat'l Health Corp.*, 2007 WL 3284669, at *12. Nothing in this opinion (continued...)

the case to the trial court for further proceedings consistent with this opinion, and we tax the costs of this appeal in equal parts to Ms. Janie Cabany and to NHC HealthCare, Murfreesboro and its surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[19](...continued)
should be construed as preventing the parties or the trial court from addressing this issue on remand.